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In the Supreme Court of the United States

OCTOBER TERM 1998

ROBERT L. COMEAUX

Plaintiff-Appellant

V.

UNITED FOOD AND COMMERCIAL WORKERS LOCAL UNION NO. 455; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC; RAY B. WOOSTER

Defendants-Appellees

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI VOLUME II

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APPENDIX 9

Page 193

interchange. I did exactly the same thing, and
[2] Robin continued to follow me. It was okay with me
[3] if he followed me but I was going to my mom's
[4] birthday party in Baytown. And Robin followed me
[5] until he got to the Channel View exit, and then he
[6] got off of the freeway.
[7] I later talked with Rita Orsack, who was
[8] the person in charge of the picket line at Lake
[9] Jackson, Texas, and they were very angry with Robin
[10] because he was supposed to have been there early
[11] afternoon with their checks, and he wasn't there
[12] until nearly 5:00. And so many of the people who
[13] came from a good distance to walk the picket line
[14] there had to wait until the next day or the next
[15] work shift before they got their checks
[16] After - well, the next summer after I
[17] had agreed to support Bill Hopkins' candidacy for
[18 the president of Local 455, Miles Anderson and
[19] Sandy Borowicz, B-O-R-O-W-I-C-Z, were working with
[20] me in San Antonio. They had been exiled to San
[21] Antonio to get them off the playing field, and they
[22] spent a lot of time at my house lamenting that
[23] fact. And one of the things that Miles Anderson
[24] told me was that he had been instructed by Ray
[25] Wooster and later by Richard Elliott to monitor my

Page 194

[1] activities and report back to the office when my
[2] car was visible in San Antonio and when it was not.
[3] And he talked about how difficult that was, because
[4] there were five or six vehicles around my house.

By this time, in order to conserve my money, I had rented out all four bedrooms upstairs in my house, and I was living in the downstairs room, and so all the people who lived in the house had vehicles.

Q. Did Mr. Anderson specifically give you to understand that he was instructed as part of his job to monitor your movements?

A. Yes, he did.

Q. All right. I didn't meant to interrupt you, except I wanted to clarify that.

MR. SCHULMAN; Let's take a little break.

(Lunch break.).

Q. (BY MR. SCHULMAN) All right. Mr. Comeaux, returning your attention to sometime to the time period when you were campaigning and distributing what you described as your REBUILD petitions, were there other repercussions that you would like to describe for these gentlemen?

A. Yes. Jean Bane, B-A-N-E, had been laid off prior to my layoff, and when she was laid off,

Page 195

they continued making her health care payments whereas when they laid me off, they immediately told me I'd be on COBRA the next month if I wanted to continue.

In December when I was passing out the petitions, out of the blue for the first time since she had been laid off. Greg Schulze, S-C-H-U-L-Z-E. called Jean Bane and asked her if she had talked to me. And I think Jean Bane refers to this in Exhibit I. But shortly thereafter, Jean Bane received a letter from the local union telling her

that her layoff was permanent and that if she wanted to continue with health care benefits, that she'd have to self-pay COBRA.

MR. NELSON: By the way, I don't have Exhibit 1, I forgot to tell you that earlier, but when he just mentioned it - so at some point I'd like to get a copy of Exhibit 1.

MR. SCHULMAN: Okay. No problem.

MR. NELSON: Sorry.

A. And Jean Bane told me that she felt that was retaliation for her friendship with me.

Q. (BY MR. SCHULMAN) All right. Mr. Comeaux, do you know of any occasion when Defendant Wooster referred, say, after your

Page 196

termination, hopefully or approvingly to the end of your political activity?

A. He made a comment to a staff meeting of the local in December of 1992 that they would not have to worry about me after December 31st of 1992, that I would be history because my eligibility for membership would have expired. I was told this by Miles Anderson at my house around August or September of 1993. Miles mentioned this staff meeting where this was brought up.

MR. NELSON: When did Miles tell you that?

THE WITNESS: In August or September of 1993.

MR. NELSON: Thank you.

Q. (BY MR. SCHULMAN) Did Mr. Anderson tell you if anybody answered Wooster?

A. Miles told me that he had commented that,

"You don't know this guy. He'll find a way to maintain his membership."

Q: Please tell these gentlemen, Mr. Comeaux, if you have ever heard any specific reference to an attempt to blacklist you, using that word "Blacklist."

A: In the end of January of 1993, there was

a meeting at the Holiday Inn Express for the AppleTree employees. This was during the period of time when we were continuing the petition for the REBUILD Committee. And the local made the decision to call the first meeting for the AppleTree strikers that had been held in six months. I attended that meeting.

Afterwards, I was speaking with Rita Orsack and another person from her store in the parking lot when Robin Phillips came up to me and started taunting me and - you know, taunting me about the fact that I had not been able to secure a job with the international or a job with one of the other local unions, and very, very - he certainly gave the impression that that was not going to take place and that the word was out not to hire me.

Q: After your termination, were you ever told specifically that the management of the Kroger Company received a request from any agent of the defendants not to hire you?

A: I received a statement from Sandy Borowicz in August or September, I believe, 1993. This was after - this was at a time when I knew that my only chance for emplolyment in the industry was in the Nacogdoches store, which came out of the

Page 198

Dallas division of Kroger: and that Sandy had been their business agent, and my only hope for getting a job there was through Sandy.

Before Sandy would open that door, I had to pledge that I would vote for and assist Bill Hopkins in his attempt to become president. And I explained to Sandy that I intended to be a candidate and would be on the ballot if there was any way in the world I could be on the ballot, but I did pledge that I would vote for Hopkins and encourage many of my supporters to.

So she did open the door for me there. and I got the job in Nacogdoches. She also gave me a statement, and she and Miles Anderson both pledged to give a statement to the NLRB on my behalf.

We talked about the strategy of the timing of my unfair labor practice against Kroger at a time that would try to diminish the influence Kroger was having on the election process. Sandy gave me a statement, and in that statement she quoted Jim Ogren, Jr., store manager at Kroger 12 at North Sheppard and 11th Street in Houston where I had secured employment.

After he laid me off, then he realized in

Page 199

a day or so who I was and that I had slipped through the cracks. And he - Sandy's statement alludes to the fact that he said, "How was I supposed to remember this guy that they told us not to hire after so many months?" And also the fact

that he would lie on the stand if necessary to protect his ass.

Q: All right. Would you tell these gentlemen, please, if you encountered a situation where someone employed by one of the defendants undertook to push or shove you or call the police when you were lawfully present at a union meeting?

A: I believe it was the October 1993 union meeting where I had gone to present Richard Elliott with a letter, and I walked in the door, and he immediately was angry upon seeing me. And I had driven over from San Antonio that night with Cruz Rodriguez and Joan White. And immediately upon me handing that letter to him, he told me I should mail that letter, and he pushed me and told me to get out of the meeting.

He called Roy Davila over and asked Roy to contact the security guard and have me thrown out. I told Richard Elliott that I was a bona fide rank and file union member and I had no intentions

of leaving the meeting.

By this time, I had been employed at the Nacogdoches Kroger store, had worked on the 30th of September and the 1st of October. And I do not believe the union was yet aware that I had secured that employment. Because of the previous situation that occurred to me at Kroger Number 12, I did not volunteer which Kroger store I was employed at.

The security guard came. Later the hotel manager came and had discussions with Richard and Roy. I talked to the hotel manager myself since I had stayed at that hotel for several months that

summer before being terminated, told him he didn't need to get involved, and he said he had to do whatever the people who were renting that room told him to do.

The police were called, and the police came. I did not talk to the police myself. But Richard opened the meeting, and he made the comment that if he asked the sergeant of arms to escort me to the door, that if they got me to the door, then the police would arrest me, but he didn't think there was any necessity in that, that he would allow me to stay as long as I didn't open my mouth. And I immediately stood up and said. "I

Page 201

have been defending the rights of the member of this union for 23 years, and I have no intention of being silenced. I am a rank and file member."

Q: All right. Now, you've already testified about the process of being terminated or theoretically laid off in a reduction in force. Do you know if Local 455 or the international or some combination of the two hired anyone for employment at Local 455 after you were terminated.?

A: About a month, maybe six weeks after my termination, the local union or the international or through a combination - I don't know exactly what the funding was - but brought 14 people on staff to do work that I had done in the past was capable of doing, wanted to do, et cetera.

Q: What do you know, if anything, that you can share with these gentlemen about who was hired?

A: Well, I know that one of the people that

was hired was a man named Lupe Dominguez. Lupe Dominguez had been on the staff previously, had serviced the stores in San Antonio during the period of time when John Dominguez was in Arizona trying to figure out whether or not he was going to accept that job and prior to my taking over the zone of stores in San Antonio.

Page 202

After I took over the stores, in a staff meeting in which I was present. Ray Wooster announced that he had terminted Lupe Dominguez, that Lupe Dominguez was a thief, that Lupe Dominguez had stolen $400 worth of the members' money by making phone calls to his girlfriend in San Antonio on the local union's credit card, and, you know, would never work again in the local. That was sometime between January 2nd and May of 1992. But it was very, very public and very, very overt comments by Ray Wooster.

And then right after I am terminated, all of a sudden Lupe Dominguez, who was popular in San Antonio and was Hispanic and knew the way around - they had a political problem once they terminated me, and they needed to solve the political problem, and one of the ways they do it is by overlooking past actions that were criticized openly in the staff meeting.

Q: Okay. Now, did you appeal or attempt to appeal your termination to the executive board of the local?

A: I did send a letter to Ray Wooster asking to appeal my termination. In the correspondence, he said that the bylaws gave me the right to appeal

termination on a layoff, but that he would make an exception without setting precedent. He allowed me to come and speak -

Q: Could you describe, please, what happened when you were allowed to come and speak?

A: Well, Ray Wooster relinquished the floor so that he could participate in the activities - relinquished it to Richard Elliott. And Ray made some comments, open comments. I remember he told the executive board that Doug Dougherty, who was the organizing director at the time, had asked him to hire me because they had wanted me to move to Washington, D.C., at my previous position with the international union, and that I wanted to stay in San Antonio. And so he wanted the local to hire me, and Ray Wooster said as a favor to me, he hired me so that I wouldn't be fired by the international union.

I cannot say what conversation Doug Dougherty ever had with Ray Wooster on that, but I can tell you that Doug Dougherty at no time ever discussed with me that I would be terminted if I didn't move to Washington, D.C. In fact, before I accepted the job with the international union, it was under the understanding that I would never be

required to move to Washington, D.C., and that I would not even consider it until my younger daughter graduated from high school.

But in that meeting, there were a number of the excutive board members present who had

worked at AppleTree stores that had long since closed, and the records of the local union would reflect that they were the only member of their store still paying dues. I do not know if they were self-paying their dues long after they - under the rules that Ray Wooster was trying to say applied to me as far as how long I could maintain my membership. I don't know if they were extending that period of time or whether or not the local union was paying it. But some of the stores had closed five, six months earlier,, and so people were voting on me who were not entitled to membership in the organization, according to what Ray Wooster was - how he was interpreting the constitution at that time.

Q: How he was interpreting the constitution applied to you, you mean?

A: How it applied to me.

MR. SCHULMAN: All right, Mr. Comeaux, I am finished asking you questions,

Page 253

Q: Do you know whether he was upset about the letter?

A: My knowledge of Ray Wooster is such that he would have been ballistic.

Q: And what day did you get the notice of your termination?

A: I got it that afternoon within a few hours, I'd say 3:00, 3:30 or so on September the 16th.

Q: Well, do you think your letter had something to do with your being laid off?

A: I believe that this and many other

factors were the cause of my layoff: the fact that I was going to be seeking the presidency of the local union and that they understood that - they could see a pattern of my recommendations, a pattern of my participation in staff meetings where I opposed racism, where I encouraged participation of communities on behalf of our members, where I talk about technology, where I talked about political involvement, and where I had expertise in a number of different fields were very, very important to our membership.

And they also knew that I had, when I was with the Houston organizing project, run a staff of

Page 254

30 people, had run very effectively a multimillion dollar payroll, and, you know, had the experience in hiring people, training people, motivating people, getting production out of people, and working a lot smarter than we were working at Local 455. And I consistently tried to push us to working in a more professional - and working smarter than we were working hard.

And I think that in addition to my standing up for myself and standing up for other people in stating that - you know, in oppositon to statements that your family - that you have to make a decision between your family or your job, and that your family either needs to accept it or to hell with it. I'm not going to stand for things like that any longer. I may have in the past, but I won't again.

(Deposition Exhibit 8 marked.)

(Discussion off the record.)

Q: (BY MR. FLYNN) Bob, we've handed you a document we've marked for identification as Deposition Exhibit 8. Could you tell us what that letter is?

A: This is a letter to international president William Wynn, which I enclosed a copy of

the letter Exhibit - asking the international president whether or not it was the policy of the international union or solely the one of Local 455 to threaten with reprisal those employees who are unable or choose not to contribute to a specific fund: and secondly, whether it was a policy of the international that our jobs are more important than our families.

Q: And did you make reference to you being laid off in that letter?

A: Yes, I did.

Q: Okay. Now, your reference to reprisals, were you referring to being laid off?

A: I was referring to the comments made by the international vice president Ray Wooster in the meeting on Saturday where he had said, "Those of you who cannot come up with $100 at this particular point may wish you had in a few months if the local union cuts the subsidy to the local and we have to have another round of layoffs."

He had already said in that meeting that we had already had all the layoffs that we have to go through at this particular time, that there are not any additional layoffs in the foreseeable future. And then he came up with what I viewed as

Page 256

a veiled threat, that you either pony up now, those of you who make $40,000 a year, you know, pony up to this Hurricane Andrew fund to help our members who lost everything, or you'll wish you had down the road if the international union cuts the subsidy.

Q: Is that the reprisal you were referring to?

A: Yes.

Q: And I take it you didn't make that contribution?

A: I did not make the contribution. I explained in the letter why I could not afford to.

(Deposition Exhibit 9 marked.)

MR. SCHULMAN: Since you're being so good about taking notes, Mr. Nelson, this is a letter to Ray B. Wooster dated October 5th, 1992. from Bob Comeaux.

MR. NELSON: Thank yoou. Mr. Schulman, sir.

MR. SCHULMAN: Okay.

Q: (BY MR. FLYNN) Now, we've given you a document - Exhibit 9, is it?

A: 9.

Q: Could you identify that for us, please:

Page 269

that store into Austin. And as I think I mentioned previously in the deposition, my belief was that the actions we were taking by going out there, instead of building community support by giving the rank and filers an example of what was going to be

happening to them if they went out on strike,and deliberately provoking confrontations with police officers was very, very chilling to the effect we were trying to have. And I think I've already mentioned that in the deposition.

Q: Would you say that the strike participation in Houston was also very small?

A: Yes, I might add in Austin, a number of our strongest people walked off the job on July 3rd after the judge declared bankruptcy, and they had already on two occasions said that — told the local to strike if that happened. And when the local refused to do what the local said they were going to do, the members just said, "To heck with both of them. We're going to find different jobs and get on with our lives." So that also was detrimental to the participation by our members in the Austin area.

Q: Do you recall how the AppleTree matter finally ended? I guess it was after you were gone.

Page 270

but -

A: The local union - whether there's any hand by the international or not, I don't know. But the local union called off the striking effort. I think they announced they were going to just continue a boycott of AppleTree. But at the time that that happened, it was done in such a way that only a very small handful of AppleTree members who continued to bring their dues into the office were eligible then to participate in the election of 1993. Most of the people who had walked picket for 14 months were not eligible to vote in that

election.
Q: Do you know when the local called off the strike? Just approximately when?
A: (Witness nods head.)
Q: No?
A: It would be August or so, thereabouts, or maybe September of 1993, somewhere in that time frame.
Q: And when was the local union election?
A: November 1993.
Q: And you were a candidate for president in that election?
A: I was a candidate for president in that

Page 271

election with the caveat that I've already explained that in oder to be on the ballot, I had to sell my soul to Bill Hopkins to get me the job, and I had to pledge that I would vote for him, which I did, and work for him, which I did, et cetera.
Q: So you were a candidate. Bill Hopkins was a candidate, and Richard Elliott? All three of you were on the ballot -
A: Yes.
Q: - in November 1993?
A: Right.
Q: And then there was a runoff -
A: In December -
Q: - in December of 1993?
A: - 1993.
Q: Between Bill and Richard?
A: That's correct.
Q: And Bill won?
A: That is correct.

Q: You had made mention in your September 13, 1992, letter, Exhibit 7, and in your testimony about some vacation time that you were denied to move. When was that? When was that? What month and year was that?

Page 272

A: I can't recall the exact week right now, but the records of the local - we were required like by March to put in our request for vacation, and it was consistent with that request. That was in and approved. And, I mean, I do have a copy of that, but not right here readily available.

The reason I had chosen that week was that my parents' 50th anniversary was in January, but it was at a time when my sister had just had cancer surgery, and it was also a time that a lot of the family could not get in with their - they may have - my brothers or sisters came in, but their spouses and kids couldn't come in. So my parents had planned a big Saturday mass and barbecue and party for everybody they've ever met in their life, and I was allowed to go to that.

But then Sunday, Monday and Tuesday were to be a family reunion that we try to have every three years. I was going to leave that family reunion early, if I recall, go with my younger daughter, who was running in the Junior Olympics in Los Angeles. This was within six months after the divorce. My daughter was - you know, again, I was custodial parent basically, or the one she was living with, and I wanted to be able to go over

Page 273

there and show support for her.

Q: Do you recall the month and year?
A: It was July of 1992.
Q: Okay.
A: And then the Friday, Saturday and Sunday, I had planned to move back from the apartment into my house. And I had my brother and his wife from San Antonio, my brother from Austin, and some neighbors, their spouses, who were able to work with me on that day to help me get the move done. My vacation was denied me.

Sandy Borowicz was allowed to take her vacation. Vincent Mack was allowed to take his vacation. They both were far less senior people than I was.

I finally - in order to move, but prior to the time my daughter started school for her senior year, I was able to get Richard Elliott to allow me a Tuesday and a Wednesday to move. Again, he refused to allow me to have a weekend to move where I could get some capable assistance from my friends and family who had obligations during the week.

Q: Do you know why?
A: Yes, Well, I can give you the stated

reason why
Q: Okay.
A: The stated reason, as Richard Elliott gave in correspondence to me, was that because of the importance of Saturdays in grocery stores and because we have to put our members first, that he could not allow me to take off such an important

day as Saturday, you know, for the task of moving.
Q: And were you the business rep in San Antonio at that time?
A: I was assigned to the AppleTree situation.
Q: In Austin?
A: In Austin at the time that I moved, yes. Okay?
Q: And so Mr. Anderson was there with you also in Austin?
A: He was in Austin with me as well. And there were some other people, too, other reps from other locals who were, you know, working in Austin. There was plenty of people there.
Q: So what was the real reason that you think -
A: The real reason was that -
Q: - in your opinion?

Page 275

A: The real reason was punitive, not to punish me for anything I did, but the fact that I was, you know, a qualified, capable individual who was going to be seeking the office of president, and they had to get me out of the way. You know, how do we push this guy over the limit? What's his breaking point? They hadn't found it then. They haven't found it yet, okay? That's a little editorial for the benefit of whoever wants to listen. But that was what they intended to do.
And I was then sent that Saturday to Brenham, Texas, to replace Mike Podkanowicz. P-O-D-K-A-N-O-W-I-C-Z. Mike Podkanowicz later on told me that he had not requested off, he did not

need to be off, he enjoyed being on the road, he was single, he had no family obligations. And the fact that I was sent to Brenham, Texas, was simply to show I got the power over you, and this is what I'm going to do to you.

Q: And right before that, you said that they did or did not let you off for the 50th anniversary party?

A: They let me off for the party itself. okay?

Q: And what day was that?

Page 278

A: That was on a Saturday, maybe July 25th. But, again, I've got it in my file. I've got a copy of the invitation to it.

Q: So this was like the Saturday week after, or not?

A: No. This would be right before - or this would be in August of '92, because I know one of the things that I indicated I needed to do also was - it was right before August 15th, because I'd also filed an extension for income tax purposes. and I had to deal with my ex-wife on, you know, getting the income tax out of the way. And so that had to be done by August 15th. That's why I was recommending the time frame that I did. And instead, they gave me Tuesday and Wednesday, not the Friday, Saturday and Sunday.

Q: But the Saturday, July 25th, you did get off for the 50th anniversary party?

A: I did get off that one day.

Q: And the following Saturday probably would have been August?

A: Right.
Q: And that was the day you were also requesting off that you're talking about now. that -

Page 277

A: Okay.
Q: I'm a little confused.
A: Had I been granted my vacation, I would have had that Saturday of the party.
Q: The one you did get off?
A: The one I did get off. And it would have gone through the following weekend. You're right. I would have been off that week.
And as I mentioned and stated in the letter, I was not able to get everything out of the apartment. It cost me an additional month, and it cost me additional utilities.
Q: You're referring to this letter?
A: The letter of September 13th.
Q: Oh.
A: An additional moving truck.
Q: Now, at that time -
A: Could I add one other thing?
Q: To what?
A: To the situation about the moving
Q: Okay.
A: And that is that within a few months of this particular time. Miles Anderson moved from his location to another location, was given three days to move despite the fact that he lived in Austin.

Page 278

was able, after duties in Austin, to pack up, unpack, things of this nature, whereas, you know, I

was miles away and was not given the same opportunity, the same amount of time. So, again, another example of disparate treatment.

Q: And you said that the reason for this disparate treatment, in your opinion, is because you were a candidate for the presidency of the local?

A: That is correct.

Q: And it's correct that you had not formally announced at that time; isn't that correct?

A: I had not made a formal declaration, but there were people who knew that I was going to be seeking that office, and a prudent person, and I would include in that listing Ray Wooster. Richard Elliott, Bill Hopkins, and others that would have put my name on that list.

Q: When did you formally announce your candidacy?

A: I told Greg Schulze - I asked Greg Schulze for his support. I believe, on August the 30th of 1992. I formally asked him for his support.

Page 279

MR. NELSON: What date?

A: August 30th. 1992, at a club called Mathiases (phonetic). I believe that's the date. I somewhere have the receipt for that meeting. And we went to see a friend of ours named Mark Wallney. W-A-L-L-N-E-Y. He played guitar and sang. And I asked him for his support, and he told me he was already pledged to Richard Elliott.

Q: (BY MR. FLYNN) And that's the date that

you formally announced?
A: Well, there was a - if you tell Greg Schulze, you're telling Richard Elliott and Ray Wooster.
Q: Was there a more formal announcement when you sent out a first piece of literature maybe or held a -
A: Well, my first piece of literature that I mailed out was - you're talking about an election that was held in November of 1993. My first piece of literature went out a considerable time later.
Q: If I was just -
A: My purpose -
Q: - a rank and file -
A: My purpose at that time of my life was winning a battle on behalf of AppleTree employees

Page 280

okay?
Q: If I was an AppleTree employee, a rank and file member, when would I have known that you were running for the president of Local 455?
A: Much later. I don't know exactly what time.
MR. SCHULMAN: Somebody is out there signaling me, so may I take a little break?
[Break.)
Q: (BY MR. FLYNN) Bob, do you remember my last question?
A: Refresh me, please.
Q: If I was a rank and file member from AppleTree or one of the other chains, when would I have learned that Bob Comeaux was a candidate for president of Local 455, approximately?

A: The people walking the AppleTree picket line, many of them received petitions about changes that I felt - reforms that I felt needed to be made in late November, early December of 1992.

Q: You didn't refer to yourself as a candidate for president, though, in those documents, did you?

A: In those, I did not.

Q: These were the REBUILD petitions?

Page 281

A: That is correct.

Q: So it would have been sometime in '93. then?

A: Many of the people at AppleTree knew - during the course of doing those petitions, we were talking about the necessity of making reforms in the local union, including the necessity of running people for office.

And shortly after those petitions in January of 1993, were the nominations for delegates to the 1993 Toronto convention. And the REBUILD Committee did run a slate of candidates for those positions, including myself, and we did a mailing to the entirety of the membership.

Q: Again, that mailing did not say "Bob Comeaux for president of Local 455"?

A: That is correct.

Q: Okay, I'm going to ask you about the convention thing in just a moment. When would the first literature have come out specifically stating your name and being a candidate for the local presidency? Roughly what month, if you can recall?

A: That stated that I was actually a

candidate?
Q: Yes.

Page 282

A: It would probably be in September or October of 1993. But many other pieces of literature were put out with my name on it as the chair of the REBUILD Committee, including one that was handbilled in February of 1993 at the Kroger ratification meeting.
Q: When were the nominations in the local union for the officers? For the president?
A: For the president was in October of 1993.
MR. NELSON: Excuse me. When was the Kroger ratification?
THE WITNESS: February of 1993.
Q: (BY MR. FLYNN) Who nominated you in October of 1993?
A: I did.
Q: Who nominated the other candidates?
A: I don't remember.
Q: You can't recall now whether you put out any literature with your name as a candidate prior to your nomination in October of '93? I'm talking about candidate for president.
A: Most of the literature that I put out, including during the course of the campaign, was about, you know, the reforms that were necessary in the local, changes that needed to be made.

Page 283

I do remember one specific comparison handbill that I did comparing me and Richard Elliott, and prior to putting it out, I faxed it to Bill Hopkins, and he didn't like it. He thought I

was, you know, being too easy on Richard Elliott and not hard enough on me.

And I told him - I placated him. I said, "Bill, I'm not going to let you write my literature for me." I said, "But keep in mind, Bill, the only place this is being put out is in the stores that you want me to hit, to which you have no support. So the votes I'm taking away, I'm taking away from Richard Elliott and not taking away from you."

Q: What month was this?

A: This was in - I'd say it's within two to three weeks of the first election in November of 93.

Q: Again, my question was can you recall if there was any literature put out prior -

A: And I believe -

Q: Let me finish - prior to October 1993 where your name was listed as a candidate for president of the local?

A: I don't at this particular time recall

Page 284

any, although I'd have to look at all my literature and refresh myself.

Q: Okay. Now, you testified in your deposition in February that you were working on the AppleTree strike, and you got sent to a location in Clear Lake.Do you recall that incident?

A: Yes.

Q: Approximately when was that?

A: Okay. I gave the letter to Richard Elliott that we referred to, the September 13th letter, to him on -

Q: Exhibit 7?
A: I gave it to Elliott on September 13th
Q: Right.
A: The following day, Roy Davila told me that he was changing my assignment, and I was to walk picket line in Clear Lake City. He told me that the international representative, Paul Clore, had just fired all the pickets and I had to walk it by myself.
Okay. Now, as I recall your testimony in February, my note says here that you believed that that was in retaliation for writing this September 13th letter, is that correct?
A: Absolutely, Absolutely.

Page 293

can pick it up later , review it tonight, and, you know make some notes for tomorrow morning)"
And Richard said, "Bob, I resolved that grievance last week. "And I said, "Richard, I just talked to you Monday about setting up this meeting today, and you did not mention at that time that you had resolved the grievance."
And he just immediately jumped down my throat saying, "Are you challenging my right to resolve grievances?" And I knew he was trying to get me wrapped up in an insubordination charge.
And I said, "No, sir, I'm not at all. I'm just asking" - you know, "you didn't tell me that you had already resolved it. We had made this appointment.I was calling to tell you I couldn't make this appointment at this time, but I'm still interested in the outcome of the grievance."

Anyway, he failed to draw me into that - I think he was trying to entrap me with insubordination, and he failed.

Q: What do you mean by that?

A: I think he was trying to get me to get angry and yell at him or something for solving this grievance or whatever, and I didn't take the bait.

Q: He was your boss, right, so he could have

Page 294

done that?

A: He did it.

Q. Yeah.

A: Obviously he could have done it, you know, so he had every right to. But if I had challenged, you know, him doing it or whatever, he could have perhaps had grounds for insubordination. He was trying to entrap me, and it didn't work. And that was around 1:00 o'clock that afternoon, and it was maybe an hour and a half later that I was being told to come into the office when that ploy didn't work. And I do not to this day know if such a letter of agreement exists between Kroger and the Local 455.

MR. SCHULMAN: Does it? I thought I'd get to ask a question.

MR. NELSON: It's after 5:00. Mr. Flynn.

MR. FLYNN: Just a few minutes after 5:00.

A: Obviously that settlement of that grievance was going to be a major issue in the campaign. If you have people who have been working in a grocery store for three years averaging more

than 20 hours a week and are making the same amount

Page 295

of money as somebody who just started in that grocery store that is a major political issue.

Q: BY MR. FLYNN: Well, did you learn in the campaign that Mr. Elliott had made some type of settlement that the employees viewed as being unfavorable?

A. The few employees that I filed that grievance for who I have talked with since that time - I did not ever go back in in an official capacity in those stores. I've been in most of the stores on occasion when I was applying for work in San Antonio, and I ran into a few of them and wanted to know what the status of it was. They told me they had never been informed that the grievance had been dropped, and they wanted a piece of my hide, and things of that nature.

But I don't know what was communicated from that office I didn't see it. I wasn't part of it. And I don't know yet whether or not proper - or things that we had done in the past were done in this case or whether or not they just decided to drop it because Kroger was bellyaching about, you know, moving out of San Antonio.

Q. Well, did you use that in your campaign against Mr. Elliott?

Page 296

A: No, because by that time, all of the Kroger San Antonio stores had been shut down, and only a handful of the people in San Antonio who voluntarily paid their dues were eligible to vote

in that election. But I had no way of knowing this, you know, 14 months earlier that that was going to be the case.

Q: Now, you testified in February that after you got laid off, this Greg Schulze, who you identified earlier, drove you to San Antonio, is that right?

A: That's correct.

Q. Did you and he talk about your layoff?

A. Yes, we did.

Q: Tell me what you said and he said, best you can recall.

A: Well, if you would have looked at us, you would have thought that he had been the one laid off, you know, because I told him that he was gong to - I told him the time that - on August 30th when I told him I was going to run for office, and I told him again that day that he was on the wrong team, that he knew he was on the wrong team, and that his soul would give him no peace as long as he was on the wrong team.

Page 297

And Greg and I had been friends for a long time. Y'all know that Greg plays guitar. sings union songs, that kind of stuff. he never sang one until he heard one in my car. I'm the one who turned him on to union music and stuff. And so he and I go way back to the early days of his career, and I considered him one of my closest friends. I still do.

But, I mean, I didn't give him any peace at all.I just let him know that he was on the wrong program, and that he knew it was a sham

layoff offer, that this stressful time that our local was going through was the time for leadership, and he had leadership, and he was not exerting it, that this was a time to stand up on behalf of members.

I told him that I had had to wrestle with myself about whether or not I wanted to save my own neck and run for the presidency of the local or whether or not I was going to stand up and fight for the rights of the people, the AppleTree people. And I had used many times in training sessions and other opportunities I've had to say by what right do we tell people we're going to represent them at a certain time in the future if we're not

Page 298

representing them to the fullest extent of our capabilities today.

That's like saying, "Oh, yeah. Just vote for the union, get us in here, and then I'll represent you." I said, "If you're not representing them them from day one, you're a hypocrite." And I told Greg that in that conversation, and, you know, he was the one that had the long trip to San Antonio and back.

Q: Would it be fair to say that you had some pretty strong philosophical differences with Local 455 management, being Wooster and Elliott at this time?

A: And not just -

Q: Would that be true?

A: It would be true, and it would also be true to say that I oftentimes verbalized them. And it would also be true to say that they allowed me

the opportunity to do training where I told a different version about a union where the members had power and where there was strength in the grocery stores as opposed to - in the rank and file members and the stewards as opposed to strength in the staff.

Q: And one of the many areas of your

disagreement would be in signing up these sackers as opposed to the longtime members in the store? That was one area -

A: I certainly -

Q: - that you pointed out earlier right?

A: I certainly -

Q: Just answer my question and then you can elaborate: but -

MR. SCHULMAN: I don't think it's a yes or no question, and I don't think that's a fair summary of his previous testimony. I object

A: I certainly signed up my share of sackers.

Q: (BY MR. FLYNN) Okay. Let me rephrase -

A: But may -

Q: - my question.

A: - emphasis was -

Q: Let me rephrase my question. I got the impression from your earlier testimony, and you can tell me whether I'm mischaracterizing it, and that is that it seemed to me that the administration was more interested in numbers, in other words, how many members did you sign up this week. And your idea is more in quality as opposed to quantity. Would that be a fair statement? And I'm not trying

Page 300

to put words in your mouth, but that's what I gathered from what you said. Is that right?

A: Picking up where you are, I think it's more important how many members you collect on than how many members you sign up, okay?

Q: Okay. Well, did I say something wrong?

A: I don't think you said anything wrong. And I wanted to just emphasize that I've signed up lots of sackers.

Q: Yeah. I'm not saying that is wrong.

A: But my emphasis - if I have a choice to spend half an hour with a five-year nonmember as opposed to 10 minutes with a guy that just walked in the door and hasn't had his first break doesn't know where the john is, I'm going to sign up that long member and build with strength.

Q: Okay.

A: And my strategy was a perimeter strategy. You get the people who are outside the check stands, get them first, get them locked in, because everybody who's in that front end wants to go into one of those positions.

And so I actually put a recommendation to Wooster and Elliott - to Elliott saying that I have many stores in San Antonio where several

Page 412

record?

(Discussion off the record.)

A: And this was, you know, part of a pattern that existed not just in Local 455, but as I mentioned, in Local 99R, as a means of stifling

descent. It happened here in Dallas local and, you know.-

Q: **BY MR. NELSON)** Is this a class action lawsuit?

A: No, it's not.

MR. SCHULMAN: Surely you're not saying that evidence of a pattern is not admissible in this lawsuit.

MR. NELSON: I'm not going to debate legal theories with you, but it is my belief that Mr. Comeaux will have to articulate exact complaints that he has as it relates to him. And the fact that he has some hearsay complaint about something that happened to Mr. Dominguez some years ago, I don't believe is relevant to this proceeding. That's my view. You have your view.

A: Well, I received a letter from international vice president Duane Carman, who is the director of the Dallas division, notifying me that there were no openings in response to my

Page 413

request for an application for employment. And the very same day that he informed me that there were no openings until after the Toronto convention, the same exact line that was given to me by Ray Wooster several months prior to that, that very same day, that very same afternoon, I received a call from John Dominguez, who had just cut a deal with the very same Duane Carman to return to Texas, because he was a political thorn in the side of the international in Phoenix, Arizona, and if they didn't remove that thorn in the side, he would have

been the president of that local instead of their handpicked successor that they wanted to move in from Local 711 in Las Vegas, Nevada.

And those are the examples, to answer the question you asked, that I could think of, you know, without any further study.

Q: **(BY MR. NELSON)** Well -

A: I also think that the international union, through the subsidy to the local union that hired the 14 people, deliberately overlooked my qualifications, did not offer me a position, did not - knowing that I was unemployed, knowing that that I was seeking employment in the industry in San Antonio and San Marcos and New Braunfels and

Page 414

Houston, and knowing that I had superior qualifications than all of the people who they hired put together, did not even give me the opportunity to refuse whatever salary they would have offered. And I do know that the international has a hand in that process of selection.

Q: When was Mr. Carman's letter to you approximately?

A: I do not recall the date, sir.

Q: Can you give us a season or approximate time? Was it after you were laid off?

A: Oh, it was much after I was laid off. I believe it was after I was laid off from Kroger. I had had other conversations with Duane Carman and his executive assistant at the time, George Saleeby, S-A-L-E-E-B-Y, about wanting to seek employment and asking them to send me an application.

I also had a conversation immediately upon - after my termination with Jerry Bennett, who was - collective bargaining representative, I believe, was his title from the international staff.

Q: The letter was after you were laid off from Kroger in Houston?

Page 415

A: In Houston in around July of 1993, I believe, is about the time of the letter from Carmen, but the letter could speak for itself. That's to the best of my recollection.

Q. Are there any other complaints that you can think of at this point against the international other than the relationship of Mr. Wooster being an international vice president?

A: I think I talked to you just a while ago about the relationship between with Duane Carman and Jerry Bennett and George Saleeby. And the way the international union works is that they have a very high dues structure, and they grant subsidies to local unions, not always on the basis of the validity of the program but on the politics of the participants.

Q: So is part of your complaint the subsidy policies of the international union?

A: No. My complaint is that the subsidy in that particular instance clearly shows that the international vice president in charge of Local 455 - who was the president of Local 455 at the time failed to offer a person who had recall rights any opportunity for employment because he had knowledge of my intention to seek the office of

Page 416

president of the local. And to do so would have extended my rights to membership, which was a requirement of the job.

And at the same time he was denying me that opportunity, he was taking very, very overt actions to make sure that my membership ended at the earliest possible time. And in close proximity to that time, he spoke at a staff meeting in December and said that I would be history at the end of the year.

Q: Okay. My question - I believe my last question was are you complaining about the subsidy policy of the international union in this lawsuit?

MR. SCHULMAN: Object to the question. It's been asked and answered.

MR. NELSON: Well, I'm sorry. Mr. Schulman, I didn't understand the answer. I heard verbiage as a response to my question, but in that verbiage. I didn't hear it to be responsive to the question I had asked.

A: Let me see if I can make this more succinct. I believe that that policy of the international union allows them to unlawfully interfere. And in my situatiion, they did unlawfully interfere in my employment with

Page 417

Local 455 and in my desire to seek the presidency of my local, which is my right as a union member.

Q: **(BY MR. NELSON)** And the international interfered in your rights through the actions of Ray Wooster or others?

A: They interfered directly through the

actions of Ray Wooster and they failed to correct the obvious abuses and the abuses that I called to their attention in the person of Jerry Bennett and George Saleeby and Duane Carman specifically.

Q: And do you have any documentation about those things, about Mr. Carman, Mr. Bennett and the other gentleman?

A: Well, I did have correspondence with Bill Wynn that I think you introduced into evidence yesterday. I don't recall the number of the exhibit.

Q: You identified - you just identified three individuals that you made complaints about abuses?

A: That I had conversations with.

Q: And are all of those communications oral?

A: Those conversations were oral. I did have the written correspondence with Bill Wynn, and I think I had subsequent correspondence with Bill

Page 418

Wynn. I know I had - the letter I was referring to, the initial letter on October 3rd of '92, was Exhibit 8.

I had further correspondence with Bill Wynn in an attempt, which was successful, in protecting my right to membership for an extended period of time beyond the date that Wooster wanted it to expire of December 31st, 1992.

I did have correspondence with Duane Carmen when I did ask for an application. Those –are the only ones that I recall at the present time that were written.

Q: Okay. So we can have some semblance of

an organized record, you indicated that you made complaints to three gentlemen about abuses by the international vice president Wooster and how he implemented international subsidies. Is that the thrust of your testimony a few moments ago?

A: Repeat your question.

Q: The way I understood your testimony from a few moments ago is that you made complaints to Carman, Bennett, and the third gentleman -

MR. FLYNN: Saleeby.

Q: **BY MR. NELSON)** - Saleeby regarding abuses by international vice president Ray Wooster

Page 419

in how he effectuated the subsidy policies of the international union.

A: I don't believe that was my testimony, that I spoke with him about Ray Wooster's abusive policies. Subsidy programs generally emanate out of the department of organizing in Washington. At the time, Doug Dougherty was the international vice president in charge of that department.

Q: Let me stop you. Did you make complaints to those three gentlemen-Carman, Bennett and Saleeby-regarding abuses of Ray Wooster?

A: I talked immediately upon my termination to Jerry Bennett, who was in the office at the time, and let him know it was an illegal, unlawful termination. I told Jerry Bennett I would be back. Jerry Bennett asked me not to spill the beans about what was going on on AppleTree. "Don't mess with the program," he said. You look perturbed.

MR. SCHULMAN: He doesn't like the answer.

Q: (BY MR. NELSON) What I don't - my question, in my view, called for a yes or no answer, but -

MR. SCHULMAN: Mr. Nelson, look, you're trying to limit the witness to a little

Page 420

bitty box. You're saying, "Is your only complaint about the international's subsidy program?" And he's -

MR. NELSON: Mr. Schulman -

MR. SCHULMAN: - answering you by saying, "No, I complained about an illegal termination on the day" -

MR. NELSON: No.

MR. SCHULMAN: - "it happened' -

MR. NELSON: No.

MR. SCHULMAN: - "or the day after it happened."

MR. NELSON: No, that's not the situation at all as I perceive it.

MR. SCHULMAN: The record will reflect what he said.

MR. NELSON: Yes, the record will reflect everything that he said, and I'm trying to understand what it is that he has said.

MR. SCHULMAN: Okay.

MR. NELSON: Because I was asking questions, and I was getting responses that I didn't understand were in response to what had been asked. And so I'm trying to find out what it is that he was trying to say and how that fits into

Page 421

the question that I was asking.

A: Maybe this will help. Maybe this will help. A local union is a political entity. The international union is a political entity. There are money transactions between the two. The international union has an awful lot of power, and in the situation specific to me and specific to this lawsuit, the power of the purse, at both ends of this equation, from Washington and from Houston, Texas, was used to deny me - causing me to bring this action, deny me my rights as a union member to seek the office because of whatever reason they had, and furthermore, that once verbal communication with officers of the same people that I considered to be friends and coworkers and colleagues, who I had served faithfully for many years, failed to get any resolution, which is why I have been forced to bring the litigation in the first place. Does that clarify your question?

Q: **(BY MR. NELSON)** Can you tell me how it was in what you just answered, what it is that the international union did that affected your rights?

A: When they were made aware of a termination of a long term employee, not by seniority, not something that needed to be done.

Page 422

they, number one, failed to rectify that situation: number two, failed to hire me for a subsidy program of whatever duration it may have been number three, overlooked me with greater seniority and somebody in the same region as opposed to John Dominguez, who at that time was in a different region, in Phoenix, Arizona, knowing full well that I was seeking employment here, failed to offer me

the same position that I had superior qualifications for than John Dominguez, and failed to even inteview me for the position, failed to give me any consideration, and, in fact, denied in written form that any such opportunity existed until many months thereafter.

MR. SCHULMAN: Excuse me just a minute. Our pleading has arrived.

(Break.)

MR. SCHULMAN: On the record A couple of things. One matter that Mr. Comeaux was asking me about off the record was the exhibit introduced earlier that was one page out of his multipage -

MR. NELSON: 17.

MR. SCHULMAN: I think it's 17.

MR. FLYNN: Flier.

MR. SCHULMAN: Flier, yeah. He would like either for you or for us at a later date to introduce the full document -

MR. FLYNN: I have no objection. I don't have it.

MR. SCHULMAN: Okay. Then we'll try to locate one and put the whole matter into the record as another exhibit number. And as I understand it -

THE WITNESS: Could I comment?

MR. SCHULMAN: Yes.

THE WITNESS: And the reason for that is on the inside where it quotes the Texas AFL-CIO article, it basically sides with the strategy and the concept that I was trying to

promote and what I had been, in fact, doing in San Antonio that brought me into disfavor with both the local union and the Kroger Corporation.

MR. SCHULMAN: At any rate, we'd like to get it into the record for those reasons.

MR. NELSON: We can maybe make it 17-A and B or -

MR. SCHULMAN: That would be fine. The other thing is I think we've made an agreement in principle among the attorneys that we'll adjourn

APPENDIX 10

WITNESS: RAY BROWN WOOSTER, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ROBERT L. COMEAUX	)	
	)	
Plaintiff,	)	
	)	
V.	)	CIVIL ACTION
	)	NO. SA-94-CA-0771
UNITED FOOD AND	)	
COMMERCIAL WORK-	)	
ERS LOCAL UNION	)	
NO. 455 UNITED FOOD	)	
AND COMMERCIAL	)	
WORKERS INTER-	)	
NATIONAL AFL-CIO,	)	
CLC; and RAY B.	)	
WOOSTER,	)	

DEPOSITION OF
RAY BROWN WOOSTER, JR.

JUNE 27, 1996

INDEX

PAGE

Appearances 3
Stipulations 4
Testimony of Ray Brown Wooster, Jr.
Examination by Mr. Schulman 5
Witness'Correction Page 196
Witness' Signature Page 197
Reporter's certificate Pages 199-201

Index of Exhibits

Wooster Exhibit No. 1 (Marked) 25
(First referenced) 26
Wooster Exhibit No. 2 (Marked 44
(First referenced) 44
Wooster Exhibit No. 3 (Marked) 64
(First referenced) 65
Wooster Exhibit No. 4 (Marked) 82
(First referenced) 82
Wooster Exhibit No. 5 (Marked) 84
(First referenced) 84
Wooster Exhibit No. 6 (Marked 91
(First referenced) 92
Wooster Exhibit No. 7 (Marked) 93
(First referenced) 93
Wooster Exhibit No. 8 (Marked 97
(First referenced) 97
Wooster Exhibit No. 9 (Marked) 98
(First referenced) 98

Wooster Exhibit No. 10 (Marked).....104
(First referenced).....104
Wooster Exhibit No. 11 (Marked.....128
(First referenced).....128
Wooster Exhibit No. 12 (Marked).....129
(First referenced).....129

DATE TAKEN: 6/27/96

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Sarah Youngdahl

Page 4

Deposition of Ray Brown Wooster, Jr., taken on the 27th day of June, 1996, beginning at 10:00 a.m., in the offices of Mr. Patrick M. Flynn, 1235 North Loop West, Suite 1235 Houston, Texas 77008, before SONDRA HUMPHREY, CERTIFIED Shorthand Reporter and Notary Public in and for the State of Texas

STIPULATIONS FOR THE DEPOSITION OF

RAY BROWN WOOSTER, JR.:

The attorneys for all parties present, stipulate and agree as follows:

MR. SCHULMAN: Federal Rules of Civil procedure.

MR. FLYNN: Okay.

THE COURT REPORTER: Read and sign?

MR. FLYNN: Yes.

MR. SCHULMAN: We reserve objections except to the form of the question and responsiveness to the answer.

MR. FLYNN: Okay.

* * * * * *

Page 25

layoff. One was a letter I sent to Bob Comeaux regarding his time off. One letter was to Richard Elliott in regards to Bob's time off from work. I know there was something else.

Q. That's your local recollection?

A. Yeah.

Q. I think I handed you the letter before the deposition started that —

MR. NELSON: There you go.

MR. SCHULMAN: It's not that one. This is another copy.

MR. FLYNN: You want another copy of the one that you gave me?

MR. FLYNN: Well, I would like to have another one. Actually, I think I might have one in a different form in the file.

MR. FLYNN: This one here?

MR. SCHULMAN: Yeah. I think this is the same. Let me get the court reporter

to mark an exhibit then.

(Whereupon Deposition Exhibit No. 1 was marked by the court reporter.)

Q. (By Mr. Schulman) This is, Mr. Wooster, and we'll document this, partially identified by Mr. Comeaux in his deposition that you might remember reading about it in connection with Exhibit No. 17, I think was the first page of this document when he was testifying about it. Let me ask you if you could look over the four-page document that's now been marked as Wooster Deposition Exhibit No. 1

And my first question to you after you've had a chance to review it will be if you've ever seen this item before?

A. (Witness complies.)

Q. I'm going to hold up the other version for you to see where it was kind of in a pamphlet form that might help you remember it?

A. It seems like I've seen it. I've seen so much literature.

Q. All right. Have you had a chance to look at this piece of literature?

A. I looked at it, yes.

Q. Do you recall seeing this document, Wooster Exhibit 1, in connection with an election campaign at Local 455?

A. I do recall seeing this in an election campaign I

don't recall it. I mean. I'm not sure what you're talking about "an election campaign", I guess.

Q. Well, I guess.

MR. FLYNN: I think this came out before there were any nominations. I don't remember what Bob said when he distributed this.

MR. SCHULMAN: Okay. I see. Well, maybe that helps clarify this.

Q. (By Mr. Schulman) Did you see this before there were nominations in the campaign in which Mr. Comeaux opposed Mr. Elliott?

A. It seems like I've seen this. I don't know exactly when it was. It would have been definitely way before there was—before Bob and Mr. Elliott and Bill Hopkins had their campaign.

Q. So, you would have seen this document sometime before there were any formal nominations in that political campaign. Is that true?

A. I believe so. Yes.

Q. And you would be comfortable saying "way before"?

A. I would be comfortable saying "before". I

don't know. Well, that would be good. It probably was at least a year before because I retired a year before that. So, it had to have been prior to that, I would think.

Q. All right. In reviewing this piece of campaign literature, your name is prominent, is it not

in Wooster Exhibit 1?
A. I seen my name in here a couple of times. Yeah. I've seen my name in it.
Q. And you are identified as being the Wooster Elliott campaign, I suppose, in the document?
A. I believe that's what it said.
Q. And were you a supporter of Mr. Elliott to become president of the Local after yourself?
A. I supported Richard Elliott, yes, for president of Local 455.
Q. If you don't mind, let's take a look at that. Let's see, is this one that has—
A. I don't know.
Q. —the "REBUILD"? Yes. This is the first page on the exhibit that you have.
A. Okay.
Q. Let's look at the first page together. Obviously, the author of Wooster Exhibit 1 is

Page 29

Bob Comeaux, right?
A. I would think so.
Q. And he signed it, didn't he) Right?
A. Yes.
Q. Would you have any reason to believe that he wasn't the author of it?
A. No.
Q. Early on the first page, Mr. Comeaux suggests that there's a difference in philosophy of leadership between the Wooster-Elliott campaign and the REBUILD philosophy. One representing a servicing model and the other representing an

organizing model of leadership. Do you agree with the observation that there was a difference in philosophy? Was that an issue in that election?

MR. FLYNN: What election are we talking about now?

Q. (By Mr. Schulman) In the election where Mr. Comeaux opposed Mr. Elliott for your support?

A. I would have no way of knowing whether there's a difference in philosophy between the two or not. I was retired at that point when they ran.

Page 30

Q. So, based on your years of contact with Mr. Wooster—I'm sorry—Mr. Elliott and Mr. Comeaux, you wouldn't have enough information to say whether they had a difference in leadership philosophies?

A. No, I don't think I would. I would not want to speculate on that. I have no way of knowing where Richard would have taken a Local union or Bob would have taken it.

Q. All right. So, when you supported Mr. Elliott, then would I be safe in assuming from your testimony that you would have no way of knowing where Mr. Elliott would take the local union, that you did not talk to him about his plans for the Local before supporting him?

A. No, I talked to the — I don't know. The first part of—I don't remember the exact dates.

Somewhere in January before I announced—
before I actually resigned and made my mind up
and my date. I had a meeting at the Holiday
Inn, that I paid for, with the entire staff at
that point in time, I announced my
retirement. I told them I would choose Richard
as my successor, but that they would tell me
who they wanted. And whoever they wanted, I

Page 31

would support to the Executive Board. I don't
remember who it was. It was by unanimous vote
they selected Richard and I gave him my full
support to the Executive Board and I finished
my unexpired term and he was elected.

Q. You had a meeting at the Holiday Inn with some
group of people in which you announced that
your preference would be Mr. Elliott?

A. Yes.

Q. And who was in attendance at the meeting?

A. All the representatives on the staff.

Q. When was the meeting?

A. The first part of—right before I announced,
officially announced, my retirement. The first
part of '93.

Q. Prior to the meeting where you announced your
preference for Mr. Elliott, did you talk to
Mr. Elliott about his goals or aspirations for
the Local?

A. No.

Q. Did you refer at staff meetings, a preference
of yours, not to have a contested election?

A. I believe at that meeting that was the whole—

that was the reason why I told the staff at that time whoever they chose I would support to

Page 32

the Executive Board. I don't think I told them I preferred not to have or to have a contested election one way or the other. I don't recall the subject coming up.

MR. FLYNN: Now, you're talking about the E-Board election to choose the inner president before the official local union election

Q. (By Mr. Schulman) Let's see what we're talking about

A. That's what I'm talking.

MR. FLYNN: Is that what you're asking him about?

A. I'm talking about when I announced my retirement to the Executive Board.

Q. (By Mr. Schulman) And you placed that when in time?

What?

Q. When did you have the meeting with the Executive Board?

A. I want to think it was probably in February. It was the first part of '93. I don't remember if it was January or February in which I submitted my resignation to the Executive Board.

Page 69

together, somebody has to give. This job requires this. Your family requires that. It's up to you to work it out. The same as you being a lawyer and you being here in Houston

today. But I would never tell anybody. "To hell with their family". It would be against everything that I stood for.

Q. So, you might have told them, you have to work it out on an individual basis, get a new job or get a new family. But you didn't tell them, to hell with their family?

A. No.

Q. Do you recall that the meeting of September 12th, 1992, was held on a Saturday?

A. Yes.

Q. Mr. Comeaux apparently composed the letter the Sunday, September 13. I believe he contends that he delivered it to your assistant. Mr. Elliott, on a Monday, September 14th, 1992. Do you have any recollection of whether the letter was received by Mr. Elliott or yourself?

A. No, not myself. I received it when I got back in town.

Q. Okay. So, you were not in town after the

Saturday staff meeting?

A. No, I was not.

Q. You were at the International Executive Board meeting, correct?

A. I was in Washington. I'm not quite clear whether it was an International Executive Board meeting or whether it was an AFL-CIO convention in Washington. It might have been a combination of both. I don't recall.

Q. Mr. Comeaux asserts, I believe, that on the

Tuesday after the Monday that he turned in this letter, his assignment was changed from, I guess, what you would call picket captain over several AppleTree stores to being responsible for walking a picket at single store. Do you know anything about that?

A. I know nothing about it.

Q. Do you know whether it happened?

A. No, I do not.

Q. Mr. Comeaux testified, I think, in his deposition that if you're the person in charge of hiring pickets for a store and you fire the pickets, that you get to walk the picket line yourself. Are you familiar with that adage or practice of picket line management?

A. No, I'm not.

Q. Is it correct, Mr. Wooster, that you returned to Houston on the Wednesday after the Saturday meeting reflected in Wooster Exhibit 3?

A. I returned to Houston on the 16th, whatever day that would be. I guess we can figure it out.

Q. On the date of Wooster Exhibit No. 2, which is Mr. Comeaux's layoff notice?

A. Yes, I believe that's the day. It might have been the day before. It seems like to me it had to be the day before. I returned on the 15th. I really don't recall, but it was somewhere in that area. It might have been Wednesday. I'm not sure. I'm not sure of the actual return.

Q. Now, Wooster Exhibit 2, the layoff notice —

A. Yes.

Q. — were you in the room when that document was presented to Mr. Comeaux?
A. I presented this to Mr. Comeaux myself.
Q. You did?
A. Uh-huh.
Q. And Mr. Elliott was also in the meeting, was he not?
A. Yes, he was.

Page 72

Q. There is a contention in this lawsuit, Mr. Wooster, that at the meeting on the previous Saturday, you had told the staff that there were no more lay offs anticipated unless the International cuts its subsidy. Did you make a remark to that effect to the staff on September 12th, 1992?
A. I did not.
Q. Do you recall well enough to deny that under oath or —
A. Yes, I'll deny it.
Q. Is there any documentation that you can recall ending further layoffs at that time?
MR. FLYNN: I don't understand that. I'm sorry.
Q. (By Mr. Schulman) Sure. I mean, is there some document that would reflect there were more layoffs coming on or about Septembeer 12th, 1992?
A. Specific lay offs?
Q. Yes.
A. That I know of there wouldn't be. I mean, I guess if somebody looked at a financial statement, they ought to be able to figure it

out. But other than that —

Page 129

prior to today?
A. No, I really don't recall seeing it.
Q. Do you recall it coming to your attention that Mr. Comeaux requested the opportunity to be off on August 14th and 15th of 1992 in connection with a move?
A. I really don't recall it.
Q. Were you involved in deciding whether or not this request should be approved?
A. No, not that I recall.
Q. All right. Let me show you a very poor copy. Unfortunately, it's the best one we have of a memo to Bob Comeaux from Richard Elliott dated August 3rd, 1992. So, my first question would be — oops, we need into get this marked.

(Whereupon Deposition Exhibit No. 12 was marked by the court reporter.)

Q. (By Mr. Schulman) Have you've ever seen the document marked Wooster Deposition Exhibit No. 12 before today?
A. I don't recall seeing it.
Q. Did it come to your attention through Mr. Elliott or otherwise that he was going to

Page 130

refuse to allow Mr. Comeaux to move on Friday and Saturday, August 14th and 15th?
A. I don't recall.
Q. Did it come to your attention that what Mr. Comeaux did that weekend instead of move

was work in Brenham to substitute for someone who hadn't asked to leave?
A. Not that I recall. That doesn't come to my attention.
Q. In your meeting on September 12th, 1992, the one that occurred on the Saturday before Mr. Comeaux was terminated, when you spoke of families and jobs, did you make a reference to the fact that your wife, Marlene, knew what your sentiments were about those kind of life choices
A. Not that I recall.
Q. Now, if I'm referring to what you told me earlier today correctly, to the next week on the Monday through Wednesday when you were in Washington, you already knew that it would be necessary to layoff Bob Comeaux and you were asking the people in Washington about whether there was any work available for him, is that right?

Page 131

A. I knew I was going to layoff Bob Comeaux before I ever left town. But I wanted to check with Washington about if they would hire him back before I did.
Q. Well, maybe you can help me understand when and how and by what means the decision was made to layoff Bob Comeaux?
A. Economically, we were running out of money, depleting reserves, what little reserves we had. We could not continue the cost that we

were at.
Q. Now, when you say, "we", does that mean —
A. Local 455. I made the decision.
Q. I would like you to be as specific as you can about who was involved in the decision to layoff Bob Comeaux or when it was made and what documentation might exist of that decision making process, if any?
A. There's no documentation to that process. I made the decision. And not another person knew about it, except myself. Because I knew when I went to Washington there were all types of possibilities. Who knows, they might have wanted to add to the subsidy program to keep Bob employed. They might have wanted him

Page 132

themselves to try to workout with another Local. And at that point, I did not feel there was any need to talk about it until I found out what the options were.
Q. In the letter, layout letter, that you sent Mr. Comeaux. I think that you referred to 'considering all factors'?
A. Okay
Q. After reviewing all factors, what factors did you consider with yourself
A. One is, Bob was probably the least experienced business agent we had. Two, he was, as far as I'm concerned the way I did seniority is Bob was on the bottom of the list. Three, kind of goes back to Bob's — you're constantly having to argue with him or he's his constantly not —

having his own agenda and not wanting to follow the program or the agenda that's laid out. And eating up time with it and also being the highest paid person on staff with the exception of myself and the secretary-treasurer. The highest paid business representative at that time. Actually, I think he was working on the AppleTree at the time he was laid off, not a business agent. I'm not sure. And the need of

Page 133

reduction and everything and taking everything into consideration, he was my choice. But I thought that an outside chance — not an outside chance, I didn't know. I didn't have no percentages filled. I felt that's something that could wait because I knew I was going to Washington and I woud talk to the directors and let them talk to the people in Washington and see if there was something that could be worked out with Bob and wait until I get home and that's what I did.

Q. One factor was that he was the least experienced business agent?

A. As a business representative he was.

Q. And I guess that means as a business representative of a local union?

A. Yes

Q. He was certainly not the least experienced professional, union professional, on your staff, was he?

A. I'm not sure what you're getting at. You know, I dealt with the idea that what we're keeping is for business representatives to service

their membership. And in that respect, he was one of the least experienced we had. Bob's

Page 134

most expertise was boycotts, some organizing, I guess you would say, in that area. Not actually servicing of members themselves.

Q. Okay.

A. And enforcing of contracts. It's a little different world.

Q. So, his experience was in labor confrontation-type activities like boycotts and somewhat in organizing?

A. I would say so, yes.

Q. For example, he had been the organizing director of the Local?

A. Yes.

Q. And as such, he'd had business agents reporting to him, right?

A. No.

Q. No?

A. I had an organizing staff reporting to me.

Q. An organizing staff in coordination in whatever activities of course whatever the organizing business agent did?

A. Business agents mainly — if business agents were assigned to him for organizing, then they would — he would deal with them as far as the organizing itself was concerned. As far as

Page 135

their job as a business representative, he had no authority over that.

Q. Okay, I understand.

A. None whatsoever. He had none whatsoever.

Q. Was it your sense that the importance of organizing experience at the Local in 1992, was it was relatively less important than processing grievances and general service activities?
A. I wouldn't say it was less important. It was down to what we could financially — what the local union itself had to work with and what we had to cover. And with the AppleTree — and losing of the AppleTree membership, we could see it coming, there's just no way we could afford to payroll it. You understand, weve been in a layoff period for, gosh, I don't know how many people was laid off before Bob even. Quite a few before we even got to Bob.
Q. Now, at the time, then, that you wrote Wooster Exhibit No. 2, the layoff notice, you indicated that Bob was on recall status for six months and would be considered for rehire, correct?
A. I believe the term is that he would remain on

recall status for six months and would be considered for rehire along with others if a position of a business representative was to open up.
Q. And that was your choice of words?
A. Yes.
Q. Did you mean by that the only kind of position that Bob could be considered for on this recall status was business representative? For example, if there were organizing activities available for him to work with, he wasn't to be

considered?
A. If the Local itself was going to rehire somebody on the local union payroll. I don't think it was just absolutely limited as a business representative. It's just the term we used in that case, he worked a business rep. It really would be the only full time job that I could see coming up for awhile. I would consider him along with others that do the job.
Q. So, when you said he was on recall status, you didn't mean he had any special relationship with the Local to have a recall. He would just be considered along with the persons on the street who wanted the job. Is that what you

meant by 'recall status'?
A. I believe if I would have had a reopening for another business agent, Bob might have gotten some priority. I'm not saying that it — I guess the way to put it, I was not guaranteeing him if we had another opening as a business agent it would be his job. But he would be considered and that's what I'm saying.
Q. So, the fact that he was on a recall list, according to your letter, didn't mean much, did it? He was just the same as anybody else? He was going to be considered?
A. He would be considered. I wouldn't say the same as anybody else, but he would be considered. It was not a guarantee for a job back, either.
Q. Well, in Trade union Parlance, Mr. Wooster, a recall list generally means some kind of

preference, doesn't it?
A. It depends on your collective bargaining agreement in your contract on labor. If I'd had — at that point in time, if I'd had an opening, I wouldn't have laid Bob off to start with. It come down to me making choices. And when I made the choice, Bob was my choice.

Page 138

Q. So, his relative inexperience of servicing stores was one of the factors?
A. Was one of the factors.
Q. His high salary was another?
A. Was another.
Q. His, would it be fair to say, argumentative attitude?
A. Oh, I don't know. You can call it that if you want to. I would say it's his own agenda. It was actually having to argue with him about different things to get a job done. Instead of, this is what needs to be done and having a conversation about it.
Q. So, would it be fair to say —
A. It's days of conversations with him. Sort of like the boycotting in Austin. My gosh, you know, it didn't really fit with the program. I guess one reason I approved it, I got tired of arguing with him. I think, you know, I was just — it's just he had his own agenda is what I would say about everything. I'll give you a small example. he wanted the local union to rent his garage aparatment from him so that he could make some extra money. And I sat there and tried to tell him, I must have taken three

days until I finally just told him. I said, "Look Bob, we're not going to rent the damn garage apartment from you. First of all, it's a damn home. We can't use local union money renting something from you that is your home anyhow. It was a conflict". I mean, you know, we're going into an area where I hadn't got time for this kind of stuff. A simple, "Will you rent the apartment?" A simple, "no" should have sufficed and let it go at that. We're not going to rent his apartment.

Q. The letter of complaint that Mr. Comeaux sent September 13th — dated September 13th, 1992. Deposition Exhibit No. 3.

A. No. 3?

Q. Your No. 3, his No. 7. If I'm understanding your testimony from earlier today correctly, that couldn't possibly have influenced your decision to layoff Comeaux because you hadn't received it and you'd already made up your mind, right?

A. No, I don't think it would have. It did not change my mind, if that's what you're asking. Although, I think the meeting he's referring to is an example of what I made my decision based

on.

Q. This is sort of an example of him having his own agenda or being argumentative?

A. Well, sure.

Q. Did the letter, Wooster No. 3, help confirm the decision you had already made?

A. No.
Q. No?
A. No, the decision was already made. Like I said. I already had the decision made. I got to Washington and asked Dwayne Carmen if the International would be interested to pick him up. I was going to have to lay off people. It come down to Bob. He reported back to me that the International wasn't. They had no openings. I come home. I told Bob. And I say his augumentative styles of his own agenda and reasons I laid him off was not — I mean, even at that, I offered to help the best I could. I called other local unions for him.
Q. Now, having his own agenda, what did you mean by that?
A. Oh, what would I say? First on the agaenda is there's only one way of doing something. It's my way. I guess, if I'm the boss, I have a

Page 173

about, he was not — he was not considered for the program.
Q. Because you didn't want him, right sir?
A. I would not have considered him myself. I didn't set the rules. But quite frankly, I would not have. At that point in time, I would not have considered Bob Comeaux for reappointment, if that's what you're asking me.
Q. And what would he have done by that point in time to be ineligible for consideration?
A. Oh, I think he went forward and showed a lack of cooperation that was always there. His slander of that. Just like bypass me. I mean,

he would —
Q. The slander is things he said when he asked to appeal your decision?
A. He wouldn't appeal my decision. I didn't have to. In my opinion, I didn't have to give him that appeal. When I — the entire Constitution — if the Board would have overturned me, I would have gladly put him back. But I believe at that point —
Q. You would have gladly put him back although you wouldn't have considered him to come back?
A. If the Executive Board would have overturned my

decision, I would have gladly put him back to work. They're the ruling body even though he doesn't have — constitutionally, Bob did not have an appeal. he wanted an appeal. Fine I'll give it to him. I don't care. But if the Executive Board itself wanted him to be reinstated and would have voted by majority vote for me to put him back to work, I would have put him back to work. We would have had to lay somebody else off, but I would have abided by their decision. That's what it's all about.
Q. What slanderous things did Mr. Comeaux do or say that made him ineligible for consideration to be returned in your judgment?
A. I wouldn't say he was ineligible. When Bob was laid off and after the appeal, Bob started I guess, locally some of the handbills you have that came about later on. I don't know exactly when they all came about. He started raising

hell about — I don't know what the hell I'm doing. He ain't supporting you. He ain't doing this. He ain't doing that. No. I wouldn't put him back. I mean, If I had an open opposition, quite frankly, in one of the

stores and I was looking for a staff, if I was — I mean, if it was me — Bill Hopkins who's president of the local union. If Bill Hopkins wanted to hire somebody and he wants to hire somebody who wants to run against him, Bill Hopkins ain't going to do that and neither would I.

Q. He was disloyal?

A. He was not — first of all, not eligible for the program. And if he would have been eligible, I probably at that point in time would not have considered Bob Comeaux.

Q. Because by then, he was in open opposition to you?

A. Not necessarily in open opposition to me. I was going to retire. It's just the things he was tearing down. As a member, Bob attended the meetings. He could do what he wanted to do. I didn't care, but don't expect me to do him any favors. It's like, you know, you got to understand. When Bob was laid off, I tried to help him. Bob undoubtedly didn't want the help.

Q. Well, your help didn't produce anything. I guess. Is that right, Mr. Wooster?

A. Maybe.
Q. Bob was not eligible for the program by which the 15 people were hired why —
A. Because under specific instructions by Bill Olwell, that was an Executive International Vice President at the time, who approved the program or had the program approved, told us that all the people we put on that payroll got to be subsidy people that were already on payroll. We could not play games in moving BA's over there. They had to be members out of store and preferably, some union stewards.
Q. Bob was not a BA at the time, was he?
A. No. Nor was he union steward. Or as far as my knowledge, I'm not even sure he was working at Kroger at the time.
Q. He wasn't a subsidy person you were trying to shift around, was he?
A. No, he was laid off.
Q. But he was classified as a BA. He was just somebody with recall rights, right?
A. He did not have recall — he was subject to recall.
Q. Just whatever you meant when you wrote down being on a recall level?

APPENDIX 11

FILED
FEB 7 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ROBERT L. COMEAUX	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. SA 94 CA 0771
UNITED FOOD AND	§	
COMMERCIAL WORK-	§	
ERS LOCAL UNION	§	
NO. 455; UNITED FOOD	§	
AND COMMERCIAL	§	
WORKERS INTER-	§	
NATIONAL AFL-CIO,	§	
CLC; and RAY B.	§	
WOOSTER,	§	
	§	
Defendants.	§	

PLAINTIFF'S RESPONSE IN OPPOSITION TO THE MOTION FOR PARTIAL SUMMARY JUDGMENT OF DEFENDANTS UNITED FOOD AND COMMERCIAL WORKERS UNION NO. 455 AND RAY B. WOOSTER

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now the Plaintiff, Robert Comeaux, and files this his Response in Opposition to Defendants' Motion for Partial Summary Judgment. In support of this position, Plaintiff Robert Comeaux respectfully states:

Attached Responsive Material.

Attached to this Response are the full text of Plaintiff Robert Comeaux's deposition in three volumes and the full text of Defendant Ray B. Wooster's deposition. An excellent chronological review of the facts recited from the perspective of Plaintiff Robert Comeaux is found at Exhibit 2 of Volume I of his deposition. Mr. Comeaux has given sworn testimony at Volume II, pages 153-154, lines 17 through 3, that the statements found in his chronolgy, which is Exhibit 2 of Volume I, are true.

Plaintiff submits the full text of both of these depositions (neither of which has yet been completed) to assist the Court with evaluating the pending Motion for Partial Summary Judgment and other dispositive motions which are also pending.

The Parties Agree in Part About One Issue.

Plaintiff concedes that under prevailing case law, Defendant Ray B. Wooster, while a properly named party under the Americans with Disabilities Act, 42 U.S.C. §12101 et seq., must be viewed as only being sued in his capacity as an agent of the employer Defendant United Food and Commercial Workers Union Local 455. *See by analogy to Title VII,*

Grant v. Lone Star Co., 21 F.3d 649, 651-653 (5th Cir. 1994), cert. denied 115 S.Ct. 574 (1994).

The Summary Judgment Motion Is Inappropriate Because It Is Premature.

Plaintiff has been the aggressive party in discovery in this case. So far Plaintiff has presented his own deposition for two days and deposed Defendant Ray B. Wooster for one day. However, no deposition, even of these two principal actors in the case, is completed, and other important witnesses remain to be deposed. The summary judgment effort is premature. Summary judgment should not ordinarly be granted before discovery has been completed. *Alabama Farm Bureau Mutual Casualty Co, Inc., v. American Fidelity Life Insurance Co. ("Alabama Farm")*, 606 F.2d 602, 609 (5th Cir. 1979), cert. denied, 449 U.S. 820 (1980); *Xerox Corporation v. Genmoora Corp.*, 888 F.2d 345, 354 (5th Cir. 1989) (quoting *Alabama Farm* with approval).

Standards for Summary Judgment.

All the parties and the Court know that the basic rules about summary judgment were liberalized in 1986 and that summary judgment is an ever-more popular device, especially in civil rights or employment litigation. Nevertheless, certain points are worth special notice in this particular case. The Court is respectfully asked to remember that there are seldom "eyewitnesses" to an employer's mental processes. So it is axiomatic that cases which challenge motive in employment decisions need not be proven by direct evidence. *United States Postal Service Board of Governors v. Aiken*, 460 U.S. 711, 716 (1983). Employment disputes that depend on the

employer's motive or state of mind are not well-suited for summary judgment. This is so because it is particularly difficult for the non-moving party to challenge the "self-serving testimony" of the moving party without the benefit of trial accessories, namely cross-examination. *International Shortstop, Inc., v. Rally's, Inc.*, 939 F.2d 1257, 1265 (5th Cir. 1991).

It is also significant that a lay witness's opinions about adverse employment decisions, if rationally based on his or her perceptions, are admissable. Federal Rules of Evidence No. 701 and *Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461, 1462 (5th Cir. 1989).

Fact questions and inferences must be considered with deference to the non-movant. *Waltman v. International Paper Co.*, 875 F2d 468 (5th Cir. 1989). The judge's function is not to weigh the evidence himself and determine the truth of the matter but to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

Defendants Have Misstated the Legal Basis for an ADA Claim in Their Motion for Partial Summary Judgment.

Defendants' Motion reveals either a fundamental misunderstanding or else a misstatement about the basic elements of an Americans with Disabilities Act ("ADA") claim and the proof necessary to advance such a claim. At pages 4 and 5 of their Motion for Partial Summary Judgment, Defendants argue that Plaintiff Robert Comeaux must prove that he has a "disability" and a "record of impairment" and that Plaintiff was "regarded as having such an impairment". Based upon that statement of several allegedly

conjunctive essential elements. Defendants move for summary judgment on all ADA issues.

In fact, the ADA provides a three-part definition of a "disability" in the disjunctive. A disability is present when there is: (1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual, or (2) a record of such impairment, or (3) the individual is treated as having such an impairment. 42 U.S.C. §12102(2) (Definition section above, not cited by Defendants).

The "record of impairment" subsection of the definition, 42 U.S.C. §12102(2)(b), for example, is on its face meant to apply even if the employee plaintiff is not currently afflicted or was misclassified by the employer in the past. Similarly, the "regarded as having an impairment" subsection, 42 U.S.C. §12102(2)(c), applies to protect persons with minor ailments who are misclassified as having substantial disability or even those who do not have an impairment but are treated as if they did. The ADA is meant to prohibit employer overreactions or misclassifications as well as discrimination against persons with existing substantial limitations. *See generally,* 29 C.F.R. 1630 2(1).

Defendants' Claim of No Knowledge of Plaintiff's Disability Is Met by Evidence Placing the Matter in Dispute.

Based upon a self-serving statement by Defendant Wooster, Defendants argue at pages 4 and 5 of their Motion for Partial Summary Judgment that they had no knowledge of Plaintiff's disability. This contention is met by a great deal of evidence placing the matter in dispute.

Defendants admit at page 5 of their Motion to having received (Wooster Depo., Ex. 7) a letter dated October 19, 1991, from Plaintiff's psychologist which in fact contains a work restriction of 45 hours per week applicable upon Plaintiff's return to work until Plaintiff could become stable and self-regulating as a recovering workaholic.

Also, Defendant Wooster admitted in his deposition to receipt of Exhibit 9, a letter dated October 26, 1991, wherein Plaintiff Robert Comeaux advised Defendants that he had entered a twelve-step program as a long term solution addressing his problem of workaholism (Wooster Depo. at pp. 99-100).

Further, Plaintiff testified that after his return to work in January, 1992, he discussed his ongoing 45-hours per week work restriction with Richard Elliott, Defendant Wooster's executive assistant, and Roy Davila, another Local officer (Comeaux Depo. Vol. II at p. 163). Mr. Comeaux testified that this discussion occurred at a meeting where his restricted work schedule was brought up and his work performance was criticized by these gentlemen unfairly without proper consideration of actual performance statistics (*id.* pp. 163-164).

Plaintiff in his sworn Chronology (Comeaux Depo. Vol. I, Ex. 2) at page 21 recorded a hostile encounter at a staff meeting wherein Defendant Wooster, looking directly at Plaintiff, said, "If you can't keep up with the work load, get out now." Plaintiff reasonably took this to be a direct threat because of Dr. Ehrisman's letter limiting him to a 45-hour work week.

Finally, the court's attention is respectfully directed to

Comeaux Deposition Volume II, Exhibit 7, a letter dated September 13, 1992, to Defendant Wooster in which Mr. Comeaux wrote, among other things, "I agree that serving the union is a way of life, an honorable calling. But workaholism is a disease, one from which I am in recovery. I do not plan to go back, and I do not need you or any other person trying to make feel guilty for not working 24 hours a day."[1] Mr. Comeaux testified that the letter was written in reaction to a union staff meeting on a Saturday. The letter was finalized on Sunday. Monday morning Plaintiff gave the letter to Richard Elliott, Mr. Wooster's executive assistant, in an unsealed envelope and gave Mr. Elliott permission to read it. By Tuesday, Mr. Comeaux's job assignment had been changed and on Wednesday Mr. Comeaux was allegedly laid off for economic reasons, despite an announcement by Defendant Wooster at the meeting the previous Saturday that no layoffs were expected (Comeaux Depo. Vol. I, pp. 15-34, *especially at* pp. 15, 16, 21, 22, 33, and 34).

Plaintiff respectfully urges that the factfinder in this case should be permitted to disbelieve the general self-serving statement by Defendants that they had no knowledge of Plaintiff's disability and instead believe the direct and circumstantial evidence to the contrary described above.

Defendants Have Misstated the Law Applicable to Chronic Psychological Impairments.

At pages 5 through 7 of their Motion for Partial Sum-

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[1] In this regard, the Court is respectfully asked to note that the ADA specifically forbids discriminating against an individual because he or she has opposed an employment practice of the employer or participated in formal enforcement activities. *See,* 42 U.S.C. §12111(10).

mary Judgment, Defendants argue that Plaintiff's impairments as a workaholic are not substantial and therefore cannot be considered a disability. As noted above, Defendants have mistakenly read the statutory definition of "disability" so that the three disjunctive alternatives in the definition must, according to Defendants, be conjunctive and all ADA cases must therefore, by Defendants' mistaken logic, involve physical or mental impairments that substantially limit one or more major life activities. As noted above, that argument is wrong.

Further, the Court is respectfully asked to note that Defendants' argument relies primarily on the holding of the Fifth Circuit Court of Appeals in *Dutcher v. Ingalls Shipbuilding,* 53 F.3d 723, 725 (5th Cir. 1995). In the Dutcher case, the Fifth Circuit was concerned with an injured arm which had little or no long-term impact on the plaintiff, including no substantial limit on her ability to work as a welder or perform other daily activities. The Fifth Circuit was correct in applying the rule that temporary impairments that do not lead to long-term substantial limitations do not fit within the first definition of "disability" found at 42 U.S.C. §12102(2).

However, the Dutcher holding is not applicable to the case of a chronic mental impairment such as workaholism. The ADA regulations define physical or mental impairment at 29 C.F.R. 1630.2(h) broadly as "Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: . . . or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." It is also significant that the

Equal Employment Opportunity Commission's March 1995 regulatory guidance on the ADA's definition of disability specifically indicates that the mental and emotional processes such as "thinking," "concentrating," and "interacting with others" constitutes "major life activities" for ADA purposes. *See specifically* EEOC Compliance Manual, Vol. 2, No. 915.002; §902.3.

The ADA itself addresses the subject of alcoholism as a disability. A person who is an alcoholic is an "individual with a disability" under the ADA (42 U.S.C. §12114), although he or she is subject to ordinary performance-based standards. *See,* 42 U.S.C. §12114(c)(4).

In summary, the Defendants' argument that Plaintiff Robert Comeaux cannot be disabled as a matter of law is wrong because it is based upon a misreading of the statutory definition of "disability" and a false analogy to a case describing an injury followed by no substantial limitations on working on any other of the plaintiff's major life activities.

Defendants' Claim that Plaintiff Was Not Disabled Within the Context of His Workplace Is Met by Evidence Placing the Matter in Dispute.

Defendants' claim tht Plaintiff was not disabled within the context of his workplace is met by evidence placing the matter in dispute. In this regard, the Court is respectfully referred to the Affidavit of Clara Jean Bane (Comeaux Deposition Vol. I, Exhibit 1), especially at paragraphs 11 and 12. In Ms. Bane's Affidavit, she describes the hours demanded of the union staff for Local 455 as "more than 55 hours per week" and threats made on a regular basis to terminate or

replace staff members who could not keep up with the workload by Defendant Wooster, his executive assistant Richard Elliott, and others. Ms. Bane also specifically describes Mr. Comeaux's former pace as noticeably more than sixty hours per week. Ms. Bane also describes no surprise to her that Plaintiff had been diagnosed as a workaholic.

If Ms. Bane's statements are taken as true as they must be at this stage in the proceedings and all inferences from them are drawn in Plaintiff Robert Comeaux's favor, the Court can easily understand why Robert Comeaux was disabled in the context of this extraordinarily stressful workplace featuring long hours and constant threats by management against those who might wish not to maintain them.

Defendants' Arguments Based Upon Union Patronage and Loyalty Principles Are Not Applicable to this Case.

Defendants argue at page 9 of their Motion for Partial Summary Judgment that Plaintiff's cause of action under the Labor Management Reporting and Disclosure Act ("LMRDA") must fail as a matter of law based upon the decision of the Supreme Court of the United States in *Finnegan v. Leu*, 456 U.S. 431 (1982), and its progeny. Plaintiff respectfully asserts that the principles of the *Finnegan* case which allow for political patronage and an elected officer's privilege to select loyal followers are not applicable in this case.

Several important facts which show that the *Finnegan* principles do not apply are admitted in the deposition of Defendant Wooster. First the Court will please note that the alleged layoff of Robert Comeaux was pursuant to a September 16, 1992, letter from Ray B. Wooster to Robert

Comeaux citing economic reasons only (Wooster Depo., Ex. 2) and not any differences of ideology between Robert Comeaux and Ray B. Wooster. In fact, Ray B. Wooster was resigning from the office of presidency and not himself standing for re-election (Wooster Depo., p. 188). Defendant Wooster testified that he would not have terminated Plaintiff were it not for the financial situation (Wooster Depo., p. 153). He also testified that Plaintiff did not do the opposite of what he was told (Wooster Depo., p. 152), was not insubordinate (Wooster Depo., p. 152), was not disloyal nor in open opposition to Wooster (Wooster Depo., p. 175), was not running against Wooster for president and Wooster was not sure that Plaintiff was running against Elliott to succeed Wooster (Wooster Depo., p. 177).

The principles of the *Finnegan* case apply to allow an elected union official to practice patronage by rewarding his or her campaign supporters and choose staff he or she trusts and considers to be loyal and likely to follow the programs of the elected official's administration. The *Finnegan* case does not apply to protect an out-going officer's right to terminate a prospective opponent to his hand-picked successor who has not yet won election and the subsequent right to practice patronage. Any political privilege not to maintain Robert Comeax in employment for ideological reasons after Mr. Comeaux lost the election belonged to the newly-elected president (who, ironically, did not at all turn out to be Defendant Wooster's executive assistant Richard Elliott).

Conclusion

For the reasons stated above, the Defendants' Motion for Partial Summary Judgment should be denied as to all issues except that Plaintiff has conceded that any liability of Defendant Wooster under the ADA is only in his agency capacity.

Respectfully submitted,

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By: /s/ John E. Schulman

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COUNSEL FOR PLAINTIFF

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was mailed, postage prepaid, on this the 7th day of February, 1997, to counsel for Defendants.

By: /s/ John E. Schulman

John E. Schulman

TABLE OF AUTHORITIES

	CITE	PAGE
1.	*Alabama Farm Bureau Mutual Casualty Co., Inc., v. American Fidelity Life Insurance Co.*, 606 F.2d 602, 609 (5th Cir. 1979), *cert. denied.* 449 U.S. 820 (1980)	2
2.	*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)	3
3.	*Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 725 (5th Cir. 1995)	6
4.	*Finnegan v. Leu*, 456 U.S. 431 (1982)	8
5.	*Grant v. Lone Star Co.*, 21 F.3d 649, 651-653 (5th Cir. 1994), *cert. denied* 115 S.Ct. 574 (1994)	2
6.	*Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461, 1462 (5th Cir. 1989)	3
7.	*International Shortstop, Inc., v. Rally's, Inc.*, 939 F.2d 1257, 1265 (5th Cir. 1991)	3
8.	*United States Postal Service Board of Governors v. Aiken*, 460 U.S. 711, 716 (1983)	3
9.	*Waltman v. International Paper Co.*, 875 F2d 468 (5th Cir. 1989)	3
10.	*Xerox Corporation v. Genmoora Corp.*, 888 F.2d 345, 354 (5th Cir. 1989)	2

TABLE OF AUTHORITIES (continued)

	CITE	PAGE
11.	*Federal Rules of Evidence* No. 701	3
12.	42 U.S.C. § 12101 *et seq.*	2
13.	42 U.S.C. §12102(2)	4,7
14.	42 U.S.C. §12102(2)(b)	4
15.	42 U.S.C. §12102(2)(c)	4
16.	42 U.S.C. §12111(10)	5
17.	42 U.S.C. §12114	7
18.	42 U.S.C. §12114(c)(4)	7
19.	29 C.F.R. 1630.2(h)	7
20.	29 C.F.R. 1630 2(1)	4
21.	EEOC *Compliance Manual*, Vol. 2, No. 915.002; §902.3	7

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ROBERT L. COMEAUX	§	
Plaintiff,	§	
	§	
v.	§	
	§	
UNITED FOOD AND	§	**CIVIL ACTION**
COMMERCIAL WORK-	§	**No. SA 94 CA 0771**
ERS LOCAL UNION	§	
NO. 455; UNITED FOOD	§	
AND COMMERCIAL	§	
WORKERS INTER-	§	
NATIONAL UNION	§	
AFL-CIO, CLC; and	§	
RAY B. WOOSTER,	§	
Defendants.	§	

AFFIDAVIT OF JOHN E. SCHULMAN

Before me, the undersigned authority, on this day personally appeared JOHN E. SCHULMAN, who, after being duly sworn, upon oath stated:

"My name is John E. Schulman. I am over twenty-one (21) years of age, of sound mind, and an attorney at law duly licensed to practice in the State of Texas and before this honorable Court. I am counsel of record for Plaintiff Robert Comeaux in the above captioned case. As such, I have personal knowledge of the facts which I herein state under oath.

"Attached hereto is a true and accurate copy of the three-volume transcript of the deposition of Robert Comeaux, which was taken in this matter. A copy of this transcript was delivered to my office by the court reporter who officiated at the deposition. My office has had custody and control over the copy of the transcript since that date. The copy attached hereto was photocopied in my office from the copy originally delivered to my office.

"Also attached hereto is a true and accurate copy of the transcript of the deposition of Ray Brown Wooster, which was taken in this matter. A copy of this transcript was delivered to my office by the court reporter who officiated at the deposition. My office has had custody and control over the copy of the transcript since that date. the copy attached hereto was photocopied in my office from the copy originally delivered to my office."

FURTHER AFFIANT SAITH NOT.

/s/ John E. Schulman

JOHN E. SCHULMAN

STATE OF TEXAS

COUNTY OF DALLAS

Subscribed and sworn to before me this 7 day of February, 1997.

ANTHIA D. FRYE
Notary Public
STATE OF TEXAS
Commission Expires 11/05/00

/s/ Anthia D. Frye
NOTARY PUBLIC

My Commission Expires: 11/05/00

APPENDIX 12

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50013
Summary Calendar

FILED
OCT 02 1998

ROBERT L. COMEAUX,

Plaintiff-Appellant,

versus

UNITED FOOD AND COMMERCIAL WORKERS LOCAL UNION NO. 455; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, RAY B. WOOSTER,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. SA-94-CV-771

Before GARWOOD, JOLLY and BARKSDALE, Circuit Judges.

PER CURIAM:*

Robert L. Comeaux appeals the district court's grant of summary judgment dismissing his claims under the Labor Management Reporting and Disclosure Act and Under 42 U.S.C. § 1985 (3). Having reviewed the record and the briefs of the parties, we AFFIRM, for essentially the reasons set forth by the district court. *Comeaux v. United Food and Commercial Workers Local Union No. 455,* No. SA-94-CA-0771 (W.D. Tex. Sept. 30, 1997).

AFFIRMED.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

APPENDIX 13

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 98-50013

FILED
OCT 29 1998

ROBERT L. COMEAUX,

Plaintiff-Appellant,

v.

UNITED FOOD AND COMMERCIAL WORKERS LOCAL UNION NO. 455; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC; RAY B. WOOSTER,

Defendants - Appellees.

Appeal from the United States District Court
for the Western District of Texas, San Antonio

ON PETITION FOR REHEARING

Before GARWOOD, JOLLY and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED

ENTERED FOR THE COURT:

/s/ Will Garwood
United States Circuit Judge

REHG-2

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE